STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 17, 2013
v	No. 310253 Macomb Circuit Court
ANDREW TERRELL CLARK, Defendant-Appellant.	LC No. 2011-000803-FC

Before: JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b),[1] unlawfully driving away an automobile (UDAA), MCL 750.413, arson of personal property valued at $20,000 or more, MCL 750.74(1)(b)(*i*), and larceny in a building, MCL 750.360. The trial court sentenced defendant to concurrent prison terms of life without parole for the murder convictions, 40 to 60 months for the UDAA conviction, 80 to 120 months for the arson conviction, and 32 to 48 months for the larceny conviction. We affirm in part but remand for correction of the judgment of sentence consistent with this opinion.

Defendant was convicted of murdering Robert Miller, who died from multiple stab wounds. Miller's body was discovered inside his condominium. An autopsy revealed that he had been stabbed 132 times and sustained other blunt force injuries. Miller's car was missing from his house after the offense, and was later discovered burning less than a mile from defendant's home.

Defendant's DNA profile matched DNA taken from items located at the crime scene. Telephone records showed that defendant and Miller were in telephone contact in the weeks leading up to the offense and that defendant was the last person who called Miller on the night of

[1] As explained more fully in part III, *infra*, we remand to the trial court for correction of the judgment of sentence to specify that defendant was convicted of a single count of first-degree murder supported by two alternative theories. See *People v Orlewicz*, 293 Mich App 96, 112; 809 NW2d 194 (2011).

the offense. A cell phone "ping search" placed defendant and Miller together on the night of the murder. A handwritten note was found at the crime scene which stated, "He said tell the family he loved them. Sincerely, 'The Killer.'" A forensic document examiner testified that the writing on the note was consistent with defendant's writing. A diamond studded earring was found at the crime scene, which matched another earring found during a search of defendant's residence. In a recorded jailhouse telephone conversation, defendant told his brother that he killed Miller during a "robbery" that he set up. The police found receipts at defendant's home indicating that he had pawned Miller's wedding rings, and pawnshop business records also identified defendant as the person who pawned the rings. Surveillance video showed defendant's friend buying a gas can and gasoline a short distance from where the car was found. Miller's computer equipment was found in the trunk of the burned car. After defendant was arrested, he gave a police interview in which he claimed that he killed Miller in self-defense after Miller made unwanted sexual advances toward him.

I. MOTION TO SUPPRESS

Defendant first argues that the trial court erred by denying his pretrial motion to suppress his custodial statements. Defendant argues that the statements were not knowingly and voluntarily made. The trial court's determination that a custodial statement was knowing, intelligent, and voluntary is reviewed de novo. *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). This Court must examine the entire record and make an independent determination. *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998). However, deference is given to the trial court's assessment of the weight of the evidence and the credibility of the witnesses, and the trial court's findings will not be reversed unless they are clearly erroneous. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake was made. *People v Ryan*, 295 Mich App 388, 396; 819 NW2d 55 (2012).

"A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). "Whether a waiver of *Miranda*[2] rights is voluntary and whether an otherwise voluntary waiver is knowing and intelligent are separate questions." *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). A waiver of rights is voluntary if it is the product of a free and deliberate choice rather than intimidation, coercion, or deception. *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152 (2000). "Whether a suspect has knowingly and intelligently waived his *Miranda* rights depends in each case on the totality of the circumstances, including the defendant's intelligence and capacity to understand the warnings given." *Howard*, 226 Mich App at 538.

Relevant factors in determining voluntariness include the defendant's age; the defendant's education or intelligence level; the extent of the defendant's previous experience with the police; whether the defendant was subjected to repeated and prolonged questioning; whether the defendant was advised of his constitutional rights; whether there was an unnecessary

[2] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

delay in bringing the defendant before a magistrate before he made his statement; whether the defendant was injured, intoxicated, or drugged, or in ill health when he made the statement; whether the defendant was deprived of food, sleep, or medical attention; and whether the defendant was physically abused or threatened with abuse. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). "The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness," *id*., and "[n]o single factor is determinative," *People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005).

The record supports the trial court's determination that defendant knowingly and intelligently waived his *Miranda* rights. Although defendant emphasizes that he was only 19 years old and had a limited education, the testimony indicated that defendant had a tenth grade education and could read and write English. Before interviewing defendant, detectives used a standardized form to advise defendant of his rights and defendant was told to "speak up" if he did not understand any of his rights. He acknowledged that he understood his rights and he placed his initials next to each right on the form to indicate that he understood. Defendant acknowledges that there was no indication that he was injured or under the influence of alcohol or drugs, or that he was in ill health or deprived of food, sleep, or medical attention during the interview. According to the police detective, defendant was attentive during the interview, did not slur his speech, did not appear to be ill, followed commands, and gave coherent answers to questions asked. In light of this record, the trial court did not clearly err by finding that defendant was capable of understanding his *Miranda* rights and knowingly and intelligently waived those rights. Although defendant complains that he was not reminded of his rights after various breaks in the interview, "[t]he police are not required to read *Miranda* rights every time a defendant is questioned." *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992). There is no evidence that defendant was ever led to believe that his rights were no longer applicable or that defendant no longer understood his rights.

The record also supports the trial court's determination that defendant's confession was voluntary. Defendant primarily relies on the length of the interview to argue that his statements were not voluntarily made. Although defendant claims that the interview "lasted all night and into the next day," the testimony indicated that the interview covered a period of approximately 5 ½ hours and concluded at approximately 9:30 p.m. Further, defendant was afforded several breaks during this period, during which he was permitted to use the restroom and smoke cigarettes, and was given cookies and water. The actual questioning comprised a total period of only approximately two hours and 45 minutes. Defendant acknowledges that he was not physically abused during the interview. In view of the totality of the circumstances, the trial court correctly determined that defendant's statements were voluntarily made. The trial court did not err by denying defendant's motion to suppress the statements.

II. PROSECUTORIAL MISCONDUCT

Defendant also argues that improper remarks by the prosecutor during closing argument denied him a fair trial. Because defendant did not object to the challenged remarks at trial, this issue is not preserved. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Therefore, appellate review is limited to ascertaining whether there was plain error that affected defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), and is not required to state his inferences in the blandest terms possible, *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). But a prosecutor may not appeal to the jury to sympathize with the victim, *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008), or resort to a civic duty argument that appeals to the fears and prejudices of jury members, or express a personal opinion of the defendant's guilt, *Bahoda*, 448 Mich at 282-283; *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004).

Defendant argues that the prosecutor made an improper appeal to the jurors' sympathy by referring to him as a "cold-blooded killer," suggesting that he showed no remorse during his police interview, and asking the jury to "think about how the family felt" when referring to the note left at the crime scene. In his closing argument, the prosecutor discussed the evidence linking defendant to the crime and then remarked:

> We know that it was this defendant and he's a cold-blooded killer. . . . He showed no remorse during the interview. He was stretching and yawning when the police were out of the room like nothing phases him, puffing on his cigarettes during his break. This is no big deal. . . .
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> And the note, sincerely the killer. Calling yourself the killer. I mean, that is bone chilling. Think about how the family felt.

Defendant was charged with first-degree premeditated murder. A defendant's conduct after the killing may be relevant to a determination whether there was sufficient premeditation and deliberation for a finding of first-degree murder. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995); *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). In *Paquette*, this Court held that it was not improper for a prosecutor to elicit testimony regarding a defendant's lack of remorse during a police interview because such questioning was relevant to a determination whether there was premeditation. Therefore, the questioning did not inject issues broader than the defendant's guilt or innocence. *Paquette*, 214 Mich App 342-343. Similarly in this case, the prosecutor's remarks characterizing defendant as a cold-blooded killer, referencing his lack of remorse during the police interview, and referencing the note that was left at the crime scene did not involve blatant appeals for sympathy, but rather were relevant to the prosecutor's theory that defendant had the state of mind to commit a premeditated murder. Viewed in context, the remarks did not amount to plain error. To the extent that the remark "Think about how the family felt" could be considered an improper appeal to the jurors' sympathy, it did not affect defendant's substantial rights because it was brief, isolated, and relatively innocuous. Further, the trial court instructed the jurors that they "must not let sympathy or prejudice influence your decision." The court's instruction was sufficient to protect defendant's substantial rights. *Unger*, 278 Mich App 237-238.

Defendant also argues that it was improper for the prosecutor to argue that he was "targeting gay males." Defendant characterizes this remark as another improper attempt to evoke sympathy for the victim. This comment was made in the context of the following prosecutorial argument:

> The evidence shows how he set it up. He was targeting gay males. And we know the stereotypes and we know that stereotypes aren't true, but nevertheless they exist. And we know the stereotypes of gay men. Stereotypes being that they are feminine they are weak, easy to control.
>
> That is what he was doing. He was trying to get an easy target.

It is apparent from the context of these remarks that the prosecutor was not attempting to evoke sympathy for Miller because he was gay, but rather was arguing that Miller's status was relevant to defendant's selection of him as a victim. Thus, there was no plain error. Moreover, even if the comment had been otherwise inappropriate, a timely objection and request for a curative instruction would have dispelled any possible prejudice flowing therefrom. *Id*.

Defendant also challenges the following emphasized remarks, which he argues involved an improper attempt to appeal to the fears and prejudices of the jurors:

> And we do know that he killed Mr. Miller. 132 stab wounds. Blunt force trauma to the head and the face. You heard Dr. Spitz. . . .
>
> I know he says he bit his ear but Dr. Spitz said that the ear was sliced off. And his eyelid was sliced.
>
> *Now our body is pretty resilient, right. We know that.* I mean, most of our vital organs, they are protected by fat or muscle sections, or rib cage. So that is why out of 132 stab wounds only three were life-threatening. The stab wound to the liver, the lung, and then the artery in the back of the neck. . . .
>
> Probably would have lived. Without the medical attention, with all the stab wounds, he bled to death. . . .
>
> And you guys saw the wounds to the back of the neck, which were probably the last wounds administered. The wound to the back of the neck and head. *Mr. Miller looked like a freaking pin cushion*. [Emphasis added.]

Contrary to defendant's claims on appeal, these remarks do not reveal an attempt to appeal to the fears and prejudices of the jurors. The prosecutor was not injecting issues broader than defendant's guilt or innocence, but rather was commenting on the nature and number of stab wounds sustained by the victim to support an argument that defendant committed a premeditated killing. It is axiomatic that "[t]he nature and number of a victim's wounds may support a finding of premeditation and deliberation." *Id*. at 231. We perceive no plain error with respect to these remarks.

Lastly, it was not improper for the prosecutor to suggest that defendant lied during his police interview. A prosecutor may argue from facts in evidence that the defendant or another witness is not worthy of belief. *Dobek*, 274 Mich App at 67. In the present case, the prosecutor pointed out the numerous differing scenarios that defendant gave detectives regarding Miller's death to suggest that defendant was not worthy of belief. The prosecutor urged the jurors to examine the evidence in its totality and to use their common sense when determining the

credibility of defendant's statements. The prosecutor did not imply that he had any special knowledge that defendant was lying. Accordingly, there was no error, plain or otherwise.

III. FIRST-DEGREE MURDER CONVICTIONS

Although defendant does not raise this issue in his brief on appeal, we are compelled to address his dual convictions of first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b). Defendant was convicted of both first-degree premeditated murder and first-degree felony murder for the killing of a single victim. "While double jeopardy protections are violated when a defendant is convicted of both first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim, we will uphold a single conviction for murder based on two alternative theories." *People v Williams*, 265 Mich App 68, 72; 692 NW2d 722 (2005), aff'd 475 Mich 101 (2006). In other words, "the proper remedy when a defendant is convicted of both first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim is to modify the conviction to specify that it is for a single count of first-degree murder supported by two theories." *People v Orlewicz*, 293 Mich App 96, 112; 809 NW2d 194 (2011). We remand for correction of the judgment of sentence to specify that defendant was convicted of a single count of first-degree murder supported by two alternative theories. *Id.* The trial court shall forward a copy of the amended judgment of sentence to the department of corrections.

Affirmed in part but remanded to the trial court for correction of the judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Michael J. Kelly